Ethics Opinion No. 87-1

Appropriate Use of Non-Refundable Fee Deposits for Retainers and Necessary Disclosure to Client.

The committee has been asked to provide guidelines to attorneys on the appropriate use of non-refundable fee deposit or retainer agreements and what necessary disclosures must be made to clients. This opinion only addresses non-refundable fee retainers charged by an attorney in a specific matter, rather than general retainers charged by an attorney to make him or herself available over a period of time to consult with a client on general legal matters. The committee determines that non-refundable fee deposit or fee agreements are only acceptable under the limitations outlined in this opinion.

Historically, retainers were taken by attorneys as an engagement fee, separately from the fee for actual services rendered. The purpose for this engagement fee was to pay the attorney to take the case and make him or herself available to the client, thereby causing the attorney to refuse other employment and to be precluded from representing the opposing side. The reasonableness of this retainer was based on a number of factors: 1) the ability and reputation of the attorney, 2) the extent of the demand for his or her services, 3) the probability of the retainer's interfering with his professional relations with others who might become his or her clients, and 4) the magnitude of the business for which the attorney was retained. *Blair v. Columbian Fireproofing Company*, 77 N.E. 762 (Mass. 1906). Over time, the American Bar Association has come to view retainers as closely related to fees for services actually performed. Canon 44 of the Canons for Professional Ethics, adopted by the American Bar Association in 1908, stated that "upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned." The Code of Professional Responsibility currently in effect does not specifically address the issue of legal retainers, but does prohibit the charging of excessive fees. The Code stresses the necessity of fully explaining to prospective clients the structure and rationale of any fee arrangements that are contemplated. *See* Canon 2, Ethical Consideration 2-17, 2-19, and DR 2-106(A) (1974). In 1967, the American Bar Association Committee on Ethics and Professional Responsibility issued Informal Opinion 998 in response to an inquiry about a proposed procedure for a law firm to request non-refundable retainers which might or might not be applied against the hourly fee. The committee expressed strong disapproval of the proposed procedure. It observed that a retainer is "an advance payment in connection with fees and not a payment unrelated to fees" and stated that it would be improper for a lawyer to require a client to agree that a lawyer should keep the retainer "under all circumstance and regardless of services performed."

The commentary to Rule 1.5 of the proposed Model Rules of Professional Conduct indicates "a lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d)." The commentary does not make clear whether it is disapproving non-refundable retainers, or only disapproving the retention of a retainer when the attorney withdraws from representation of the client.

In current practice, non-refundable retainers are generally deposits against which a certain number of hours are charged. Hours in excess of the stated amount are generally charged against the client at a stated rate. Occasionally, non-refundable retainers are flat fees which are kept whether or not the matter is taken to completion by the attorney.

Alaska fee arbitration decisions have addressed the question of non-refundable retainers. In FA 86-31 and FA 83-22, the arbitration committees held that non-refundable retainers could not be assessed when the lawyer had failed to make clear to the client his or her intent to keep the retainer notwithstanding any events that would terminate the attorney-client relationship prior to providing a certain number of hours of service. In FA 81-7, the fee committee found that a non-refundable $5,000 retainer in a domestic case was unconscionable. In that case, the form contract provided that a client would pay a non-refundable retainer of $5,000 to secure a divorce. The contract also stated that the client would be required to pay $850 for every day of trial, plus trial costs and expenses. The contract provided that in the event the client terminated the attorneys' services, the fee paid to the attorneys would be deemed earned, and no part would be returned. The contract stated that if the attorney terminated the contract, the attorney would return the portion of the fee that exceeded the services rendered by the attorney valued on the basis of $125 per hour. The committee found that because of the stress of the domestic dispute, as well as other crises in the client's life, that she did not understand the fee to be non-refundable. Very little work was performed by the attorney firm before the client requested it to dismiss the pending litigation because she had reconciled with her husband. The committee found that use of a $5,000 non-refundable retainer and employment contract of an attorney in a divorce case is unconscionable. The committee found that it would be unfair and excessive as that term is used in DR 2-106. The committee noted that clients in divorce cases are notorious for changing their minds on whether they want to go through with the divorce. Thus, a non-refundable retainer takes advantage of a weakness that clients have in divorce cases.

> Although a small non-refundable retainer perhaps could be justified, the non-refundable amount of $5,000 was simply too much to "retain a firm." This provision creates the likelihood that substantial amounts of the client's money could be forfeited to the attorney without regard for the amount or value of attorney services performed. The committee is also concerned that the amount of the retainer might unduly influence the client's decision

regarding whether to attempt reconciliation since the forfeiture of the retainer would result.

This Committee finds that a non-refundable retainer may be charged to a client if the nature of the retainer as non-refundable is fully and clearly explained to the client, orally and in the written fee agreement, and if the fee is not excessive, considering the factors of DR 2-106:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

As noted by the fee committee in FA 81-7, the amount of the retainer should not be so great to unduly influence a client to pursue litigation contrary to public policy or the best interests of the client.

In making a disclosure to the client of the nature of the retainer, the attorney must take into consideration the state of mind of the client and the ability of the client to understand the fee arrangement. The attorney must give examples of the kinds of circumstances under which the fee would not be returned, although the legal matter had not been pursued to completion. Special care needs to be taken in a divorce case or the like to make sure that the attorney is not taking advantage of the circumstances of the client in those kinds of matters, nor creating a negative incentive to reconciliation or amicable settlement.

The attorney must refund the non-earned portion of a non-refundable retainer if the attorney withdraws from representation of the client. The attorney must also refund a portion of the non-refundable retainer if, at the cessation of representation, the retainer would be excessive under the circumstances of the particular matter.

Adopted by the Board of Governors on September 3, 1987.